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Croatian Constitutional Court Strikes Down a Number of Provisions in the Law on Associations

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Coinciding with the sweeping political changes in the Republic of Croatia, the Constitutional Court struck down provisions of eight articles of the Law on Associations (“the Law”). This development was the result of a number of suits challenging a total of twenty-four articles of the Law.¹ The applicants, including the Croatian Legal Center and CERANEO as well as other organizations and individuals, successfully challenged the mandatory registration requirement, the conditions under which foreign legal and natural persons can be founders of an association, the mandatory content of the association’s by-laws and, in connection with it, some of the underlying reasons for the denial of registration and dissolution of an association.²

Mandatory Registration Requirement

The Law on Associations (Official Gazette, no.70 of 1997) provided for the mandatory registration of associations and their umbrella organizations, and prescribed fines for those organizations that engaged in any activities before they were registered. These provisions were challenged on the ground that they violated §11 of the European Convention for the Protection of Human Rights and relevant provisions of the Croatian Constitution. The applicants contended that the provisions imposed excessive restrictions to freedom of association and hence fell short of meeting the proportionality test established by the European Court (and also embraced by the Constitutional Court in its decision: U-I-1156/1999).

The Court principally concurred with the applicants on this point, but provided an interesting elaboration of the relation between the mandatory registration prescribed in the Law and the permissibility of informal associations. In the Court’s view the underlying rationale for mandatory registration, and other provisions in the Law issuing from such a requirement, is to protect associations and third parties that seek to enter into legal transactions with associations. **Hence, the Court concluded that restrictions imposed upon the exercise of the freedom of association by mandatory registration are sought to accomplish legitimate objectives: to protect the rights and freedoms of others and the public order (§11(2) of the European Convention and §16 of the Constitution).**

However, the Court pointed out, just because the Law calls for mandatory registration, it does not follow that informal associations are not allowed to exist and operate - as was claimed in the Croatian Legal Center and CERANEO’s suit. While it is true that the Law sought to address formal associations only, it did not override those provisions of the Law on Administrative Procedure and the Law on Civil Procedure, which specifically recognize the right of informal associations to be a party in legal and administrative proceedings in some instances. From this, the Court inferred that both informal and formal associations are recognized in the current legal framework and that it is up to their founders to decide whether they should register or not.

Admittedly, the Law neglected the fact that informal associations are permissible in Croatia. Accordingly, the Court held unconstitutional those provisions in the Law that seemed to indicate otherwise. Specifically, it struck down provisions that prohibited associations and their umbrella

¹ Decision of the Constitutional Court of February 3, 2000, published in the Official Gazette No. 20 of February 16, 2000.

² The Croatian Legal Center and CERANEO’s joint suit (U-I-149/1999) posed the most comprehensive challenge to the Law.

organizations from engaging in any activities before they were registered (§§ 8(1)(4)(5), 14(3), 37(2)) and which prescribed fines for such activities (§35(1)(4)(5)).

Foreigners as Founders of an Association

The Law on Associations provided that foreign citizens who permanently reside in Croatia, or who have legally resided in Croatia for more than one year, can be founders of a registered association, under the condition of reciprocity. The reciprocity requirement also extended to foreign legal persons. These provisions were challenged on the same ground as the mandatory registration requirement: they did not satisfy the proportionality test.

The Court began its analysis by stating that a more stringent legal regime for formal (registered) vs. informal (unregistered) associations does not necessarily violate §11 of the Convention and pertinent provisions of the Constitution. However, in this particular case the Court found that the reciprocity requirement set forth in §10(3)(4) of the Law violated §11 of the Convention and §43 of the Constitution, which guarantee the freedom of association to “everyone” and “citizens” respectfully without further reference to the country of citizenship or other conditions. The Court held that “there are no legitimate reasons which would justify restrictions imposed on foreign domestic and legal persons in exercising the freedom of association ... which are attached to the actions of their respective states.” In other words, the actions or laws of one’s state should not have any impact on his/her freedom to associate in a foreign country.

Interestingly, the Court also questioned the validity of the residency requirement, which was also set out in §10(3), but fell short of delivering an opinion as to whether this requirement – in addition to the reciprocity requirement - violated §11 of the Convention. Nevertheless, by holding the entirety of §10(3) unconstitutional, the Court basically placed domestic and foreign NGOs on equal footing.³

Mandatory Content of By-laws

The Court stated that freedom of association also encompasses the freedom of founders to regulate the association’s internal governance. Following that notion, it held §11(3), which prescribed the mandatory content of the by-laws, to be unconstitutional because it failed to meet the proportionality test. In particular, the Court referred to mandatory provisions regarding membership fees, members’ liability, comprehensive internal governing structure, the liability of the members of the governing bodies and the decision-making procedure as provisions “which could have been left to the discretion of founders or addressed in other acts of internal governance.” However, the Court did not suggest any kind of rule or principle for deciding which kind of provisions could be mandated in the By-laws and which could not.

The Court also found that the overly detailed mandatory content of the by-laws, in connection with some of the underlying reasons set forth in the Law for the denial of registration and dissolution of an association, conferred upon the registration authority a great deal of unwarranted power. Hence, it held unconstitutional §17(3), which prescribed that the registration authority shall deny registration when an association failed to adjust the provisions of its by-laws within the prescribed deadline. The Court also held §§28 (1) and 37(3) to be unconstitutional. These provisions required that an association be dissolved if its by-laws do not comply with the provisions of the Law.

CONCLUDING REMARKS

The decision of the Constitutional Court poses a significant development that potentially has a cross-border impact on at least two scores. First, the legal avenue that the Court pursued in

³ Article 10(3) of the Law of Associations reads as follow: “A foreign person which permanently resides in the Republic of Croatia, or is granted a business visa or residency permit for a period exceeding one year, can be a founder of an association in the Republic of Croatia under the condition of reciprocity”.

establishing the permissibility of informal associations may prove to be a useful interim solution for those countries in the region whose laws on associations still fall short of specifically recognizing informal associations. For example, in Montenegro the new Law on Non-Governmental Organizations, similarly to the Croatian provisions that were struck down, provides for mandatory registration and prescribes fines for associations that engage in any activities before they are registered. On the other hand, similarly to the Croatian law which that country's Constitutional Court used as a rationale to strike down the mandatory registration provision, the Montenegrin Law on Civil Procedure recognizes the right of informal associations to be a party to proceedings at some instances.

Secondly, following the strict reading of the language of §11 of the European Convention, the Court placed foreign and domestic legal and natural persons on entirely equal footing as founders of an association. [For a related discussion of recent developments in the European Court of Justice concerning governmental discrimination against foreign nationals wishing to establish NGOs, see K. Simon, *Nationality-based Requirements for NGO Registration*, International Journal for Not-for-Profit Law, Vol. 2, Iss. 2; www.icnl.org]. It will be interesting to see the extent to which this path will be followed in the pending NGO legislative reforms in Croatia. It will be especially interesting to see whether the new NGO draft will make any reference to the residency requirement as a prerequisite for foreigners being founders of an association.